UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNIQUE PRODUCT SOLUTIONS, LIMITED **c/o BDB AGENT CO.** **3800 Embassy Parkway, Suite 300** **Akron, Ohio 44333** **Relator** **vs.** **RAINBOW VENTURES, LLLP** **d/b/a RAINBOW PLASTICS** **226 Basher Drive** **Berthoud, CO 80513** **And** **110 East Oak Street, Suite 200** **Fort Collins, CO 80524** **Defendant.**	)	**CASE NO.:** **JUDGE:** **COMPLAINT AND JURY DEMAND** Pat. 3,744,178

COMPLAINT AND JURY DEMAND

Qui tam relator Unique Product Solutions, Limited ("UPS"), for its Complaint against Defendant Rainbow Ventures, LLLP d/b/a Rainbow Plastics ("Defendant"), alleges as follows:

BACKGROUND

1. This is an action for false patent marking under Title 35, Section 292, of the United States Code.

2. Defendant has marked upon, affixed to, and/or used in advertising in connection with certain products the word "patent" and/or words or numbers importing that the product is patented, while Defendant knew, or reasonably should have known, that the

articles were improperly marked. *See, The Forest Group, Inc. v. Bon Tool Co.*, 590 F.2d 1295, 1302-04 (Fed. Cir., 2009). More specifically, Defendant has violated 35 U.S.C. § 292(a) by marking articles with invalid and unenforceable patent rights with the purpose of deceiving the public.

3. 35 U.S.C. § 292 exists to provide the public with notice of a party's valid and enforceable patent rights.

4. False marking deters innovation and stifles competition in the marketplace. More specifically, falsely marked articles that are otherwise within the public domain deter potential competitors from entering the same market and confuse the public.

5. False marks may also deter scientific research when an inventor sees a mark and decides to forego continued research to avoid possible infringement.

6. False marking can cause unnecessary investment in costly "design arounds" or result in the incurring of unnecessary costs to analyze the validity or enforceability of a patent whose number has been marked upon a product with which a competitor would like to compete.

7. False marking deceives the public into believing that a patentee controls the article in question, and permits the patentee to impermissibly extend the term of its monopoly.

8. False marking also increases the cost to the public of ascertaining whether a patentee in fact controls the intellectual property embodied in an article. More specifically, in each instance where it is represented that an article is patented, a member of the public desiring to participate in the market for the marked article must incur the cost of determining whether the involved patents are valid and enforceable.

9. False markings may also create a misleading impression that the falsely marked product is technologically superior to other available products, as articles bearing the term "patent"

may be presumed to be novel, useful, and innovative.

10. 35 U.S.C. § 292 specifically authorizes *qui tam* actions to be brought by any person on behalf of the United States government. By permitting members of the public to sue on behalf of the government, Congress allows individuals to help control false marking when the U.S. government does not have the resources to do so.

THE PARTIES

11. UPS is an Ohio limited liability company with a mailing address of BDB Agent Co., 3800 Embassy Parkway, Akron, Ohio 44333.

12. UPS exists to conduct all lawful business, including but not limited to enforcing the false marking statute as specifically permitted by 35 U.S.C. § 292.

13. In this action, UPS represents the United States and the public, including Defendant's existing and future competitors.

14. Upon information and belief, Defendant is a Colorado limited liability limited partnership with its principal place of business at 226 Basher Drive, Berthoud, CO 80513 or 110 East Oak Street, Suite 200, Fort Collins, CO 80524.

15. Defendant, itself and/or through one or more subsidiaries, affiliates, business divisions, or business units, regularly conducts and transacts business throughout the United States, including in Ohio and within the Northern District of Ohio.

JURISDICTION AND VENUE

16. This Court has exclusive jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

17. This Court has personal jurisdiction over Defendant. Defendant has conducted and does conduct business within the State of Ohio. Defendant, directly or through

subsidiaries or intermediaries, offers for sale, sells, marks and/or advertises the products that are the subject of this Complaint in the United States, the State of Ohio, and the Northern District of Ohio.

18. Defendant has voluntarily sold the products that are the subject of this Complaint in this District, either directly to customers in this District or through intermediaries with the expectation that the products will be sold and distributed to customers in this District. These products have been and continue to be purchased and used by consumers in the Northern District of Ohio. Defendant has committed acts of false marking within the State of Ohio and, more particularly, within the Northern District of Ohio.

19. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1395(a), because (i) Defendant's products that are the subject matter of this cause of action are advertised, marked, offered for sale, and/or sold in various retail stores and/or on the Internet in this District; (ii) a substantial part of the events or omissions giving rise to the claim occurred in this District; and (iii) Defendant is subject to personal jurisdiction in this District, as described above.

20. UPS brings this action under 35 U.S.C. § 292, which expressly provides that any person may sue for the civil monetary penalties imposed for each false patent marking offense.

FACTS

21. Upon information and belief, Defendant has, or regularly retains, sophisticated legal counsel, including intellectual property counsel.

22. Upon information and belief, Defendant, and its related entities, have experience applying for patents, obtaining patents, and marking its products with its patents.

23. Upon information and belief, Defendant maintains, or its intellectual property counsel maintains on Defendant's behalf, an intellectual property docketing system with

respect to Defendant's intellectual property rights, including Defendant's patents.

24. Defendant knows, or reasonably should know, that 35 U.S.C. § 292 prohibits a person from marking a product with an expired patent number.

25. Each false marking on the products identified in this Complaint is likely to, or at least has the potential to, discourage or deter persons and companies from commercializing competing products.

26. Defendant's false marking of its products has wrongfully stifled competition with respect to such products thereby causing harm to UPS, the United States, and the public.

27. Defendant has wrongfully and illegally advertised patent monopolies which it does not possess and, as a result, has benefited by maintaining a substantial market share with respect to the products referenced in this Complaint.

28. Defendant has violated 35 U.S.C. § 292, which prohibits a person from marking a product with an expired patent number.

COUNT 1

FALSE MARKING

29. UPS incorporates by reference the foregoing paragraphs as if fully set forth herein.

30. The application for the United States Patent No. 3,744,178 (the "178 Patent"), titled *Fishing spreader assembly,* was filed on October 4, 1971 and issued by the United States Patent and Trademark Office ("USPTO") on July 10, 1973. See Exhibit A.

31. The '178 Patent expired no later than October 4, 1991, more than 18 years ago.

32. Defendant knew that the '178 Patent expired at least as early as 1991.

33. As of September 1, 2010, Defendant continues to sell, import or offer for sale the following product (the "Falsely Marked Product") which is marked with the '178 Patent, or mark said

product with the '178 Patent, despite the fact that the '178 Patent expired over 18 years ago: Rainbow Plastics A-Just-A Bubble. *See* Exhibit B (A copy of a receipt for the Falsely Marked Product, which was purchased in the District on September 1, 2010, and photographs of the Falsely Marked Product).

34. Upon information and belief, Defendant is selling or offering for sale additional products marked with the '178 Patent, which expired more than 18 years ago.

35. Defendant falsely marked the Falsely Marked Product with the '178 Patent, which expired over 18 years ago.

36. Defendant knew or should have known that marking the Falsely Marked Product with an expired and invalid patent violates 35 U.S.C. § 292, which only authorizes marking on a "patented" article.

37. Defendant intended to deceive the public by marking or causing to be marked the Falsely Marked Product with a patent that Defendant knew expired more than 18 years ago.

PRAYER FOR RELIEF

WHEREFORE, Relator, Unique Product Solutions, Limited requests the Court, pursuant to 35 U.S.C. § 292, to:

A. Enter judgment against Defendant and in favor of UPS for the violations alleged in this Complaint;

B. Enter an injunction prohibiting Defendant, and its officers, directors, agents, servants, employees, attorneys, licensees, successors, and assigns, and those in active concert or participation with any of them, from further violating 35 U.S.C. § 292 by marketing, selling or offering for sale any product that is marked (including packaging) with the '178 Patent, which expired over 18 years ago;

C. Enter an injunction ordering Defendant to recall all products, including, without limitation, the Falsely Marked Product, that Defendant has sold, caused to be sold or otherwise caused to be placed into commerce that were marked with the '178 Patent, after the expiration date of said patent;

D. Order Defendant to pay a civil monetary fine of up to $500 per false marking violation, one-half of which shall be paid to the United States and one-half of which shall be paid to UPS;

E. Enter a judgment and order requiring Defendant to pay UPS prejudgment and post-judgment interest on the damages awarded;

F. Order Defendant to pay UPS's costs and attorney fees; and

G. Grant UPS such other and further relief as it may deem just and equitable.

DEMAND FOR JURY TRIAL

Relator demands a trial by jury of any and all issues triable of right by a jury in the above-captioned action.

DATED: September 2, 2010

Respectfully submitted:

/s/ David J. Hrina

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Unique Product Solutions, Ltd.,	)	CASE NO.: 5:10CV1967
	)	
	)	
Plaintiff-Relator,	)	JUDGE JOHN ADAMS
	)	
v.	)	**ORDER**
	)	
Rainbow Ventures, LLLP, et al.,	)	(Resolves Doc. 10)
	)	
Defendants.	)	

This matter appears before the Court on Defendant Rainbow Plastic Products, RLLLP's ("RPP") motion to change venue. Plaintiff Unique Product Solutions ("UPS") has not opposed the motion. For the reasons that follow, the motion is GRANTED.

I. Facts

Plaintiff-Relator UPS brought this *qui tam* action on behalf of the United States on September 2, 2010. In its complaint, UPS contends that RPP has been falsely marking its products with an expired patent. In response to the complaint, RPP moved to dismiss the matter in its entirety. At the same time, RPP also sought to transfer this matter to the district court for the District of Colorado. In its motion, RPP asserts that all relevant discovery will take place at or near its headquarters in Berthoud, Colorado. UPS has not responded in opposition to the motion, and the time for responding has expired.[1] The Court now resolves the matter.

II. Legal Standard

[1] The Court notes that UPS' request for an extension to oppose the motion to transfer was filed the same day as this order, well after the time for opposing the motion had expired.

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). "As the permissive language of the transfer statute suggests, district courts have 'broad discretion' to determine when party 'convenience' or 'the interest of justice' make a transfer appropriate." *Reese v. CNH America LLC*, 574 F.3d 315, 320 (6th Cir. 2009) (quoting *Phelps v. McClellan*, 30 F.3d 658, 663 (6th Cir. 1994)). In ruling on this motion, the Court must consider six factors: "the convenience of the parties and witnesses," the accessibility of evidence, "the availability of process" to make reluctant witnesses testify, "the costs of obtaining willing witnesses," "the practical problems of trying the case most expeditiously and inexpensively" and "the interests of justice." *Reese*, 574 F.3d at 320 (citations omitted).

A colleague on this Court has explained the analysis as follows:

> District courts vary in their enumeration of the specific factors to consider when ruling on a motion to transfer pursuant to § 1404(a), but such factors can include: (1) the plaintiff's choice of forum, (2) the residence of the parties, (3) the nature of the suit, (4) the place where events took place, (5) the possibility of inspecting the premises, (6) the ease of access to sources of proof, (7) the location of material witnesses, (8) the availability of compulsory processes for the attendance of those witnesses, (9) other problems that may contribute to litigation expenses, (10) the local interest in deciding the controversy locally, (11) the burden of jury duty on the community, and (12) the congestion of court dockets. From this variation, it is clear that there is no definitive list of private and public factors in the 1404(a) calculus. Courts need not discuss every factor that may influence the balance of conveniences and the interest of justice, but rather should focus their analysis on those factors that are particularly relevant to a given transfer determination.

Schindewolf v. Seymour Constr., Inc., 2010 WL 2290803, at *7 (N.D.Ohio June 3, 2010) (citations, quotations, and alterations omitted).

III. Analysis

This Court has previously resolved a very similar motion in *Unique Product Solutions, Ltd. v. Otis Products, Inc.*, 2010 WL 5296932 (N.D.Ohio Sept. 22, 2010). Therein, the Court rejected many of the arguments raised by UPS. While those arguments have not been re-raised in this action, the Court nonetheless adopts its reasoning for the instant matter.

1. Plaintiff's Choice of Forum

RPP first argues that UPS' choice of forum should not be given controlling weight. The Court agrees. In this regard, the Court has previously expressed its agreement with the opinion expressed in *FLFMC, LLC v. Ohio Art Co.*, 2010 WL 3155160, at *2 (W.D.Pa. July 30, 2010). In resolving this issue, that court held as follows:

> As Defendant thoroughly discusses, under the circumstances of this case, the factor most likely to favor [relator] is its decision to file this action in its home district. In general, a plaintiff's choice of forum is given significant weight as reflecting either a home forum or dispute-resolution preference. It is, however, given less weight when fewer of the operative facts took place in that forum, and the defendant indicates a strong preference for another district. Secondly, in a *qui tam* action the real party in interest is the United States and, accordingly, the relator's choice of venue is not entitled to the same level of deference. And thirdly, in this case, Plaintiff was apparently recently created in Pennsylvania by Pennsylvania lawyers to bring cases for alleged violations of the [false marking statute]. It appears to exist for no other purpose and to conduct no other business in Pennsylvania. The law is clear that the location or convenience of litigation counsel does not merit consideration in a discretionary transfer evaluation. To give significant, as opposed to lesser, weight to Plaintiff's choice of forum in these circumstances would effectively permit circumvention of these parameters through the creation of a shell-corporation plaintiff.

Id. (citations and footnotes omitted). Similar to the relator in *FLFMC*, UPS is comprised largely of Ohio lawyers and exists to file lawsuits enforcing the false marking statute. While the entity president is a non-lawyer, it is clear to the Court that this individual's role is to purchase products to support litigation. Accordingly, the Court agrees that little weight should be afforded to UPS' choice of forum.

2. Place Where the Events Took Place and Location of Evidence and Witnesses

It is clear that any alleged false marking that occurred in this matter took place in Colorado. As the pending motion indicates, "all of [RPP's] operations, including engineering, manufacturing, sales, and marketing are managed from Colorado[.]" Doc. 10-1 at 12. While products may have ultimately been purchased across the country, the products at issue have never been manufactured in Ohio. The primary witnesses with direct knowledge of packaging, marking, and manufacturing are all employed by RPP and work in Colorado. Moreover, the previously dismissed entity, Rainbow Ventures, LLLP, was also focused in Colorado and nearly all its former employees, potential witnesses herein, reside in Colorado. UPS has not challenged any of this evidence, nor has it offered any argument in support of an Ohio forum. Accordingly, the convenience of the parties and the witnesses strongly favors transferring this matter to the District of Colorado.

3. Local Interests

Whatever harm exists from this false marking is shared by the entire country as RPP has demonstrated that it distributes nationwide. UPS has offered no argument that Ohio has any special local interest. Accordingly, there are no compelling local interests in resolving this matter in Ohio.

4. Interests of Justice

The Court also concludes that the interests of justice strongly support transferring this matter to Colorado. The Court acknowledges that it has personal jurisdiction over RPP and therefore UPS' original choice of venue was proper. RPP sells products in Ohio and derives revenue from this state. However, for this Court to conclude that venue is more appropriate in Ohio, the Court would have to simply accept UPS' choice of forum and ignore all other factors. The Court declines to do so.

IV. Conclusion

While the Court has not opined on every factor sometimes listed by courts as relevant to a motion to transfer, the Court has considered the entirety of every argument offered by the parties. Weighing all of the factors, the relevant factors weigh strongly in favor of transfer. Accordingly, RPP's motion to transfer is GRANTED. This matter is hereby transferred to the District of Colorado.

Based upon this ruling, the Court declines to rule on the pending motion to dismiss and the pending motion to stay this litigation.

IT IS SO ORDERED.

March 8, 2011

/s/ Judge John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT COURT